182 (3) (3) (4)

Nos. 10-929/10-931/10-932

FEB 22 2011

In The
Supreme Court of the United States

DENNIS DAUGAARD,
GOVERNOR OF SOUTH DAKOTA, et al.,
Petitioners,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

SOUTHERN MISSOURI RECYCLING AND
WASTE MANAGEMENT DISTRICT,
Petitioner,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

PAM HEIN, STATE'S ATTORNEY OF
CHARLES MIX COUNTY, SOUTH DAKOTA, et al.,
Petitioners,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

AMICUS CURIAE BRIEF OF WAGNER COMMUNITY SCHOOL DISTRICT NO. 11-4 IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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Pursuant to Supreme Court Rule 37(2), Wagner Community School District No. 11-4, of Wagner, South Dakota, hereby respectfully submits this brief as *amicus curiae* in support of the Petitions for Writ of Certiorari filed by the State of South Dakota, Charles Mix County, and Southern Missouri Recycling and Waste Management District.

INTEREST OF *AMICUS* SCHOOL[1]

Wagner Community School District No. 11-4 ("School" herein) owns real property which is a part of the approximately 8,000 acres of fee property that are directly affected by the decision rendered by the Eighth Circuit Court of Appeals in *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951 (8th Cir. Aug. 25,

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. Written consent of all parties accompanies this brief. Counsel of record for the school is an associate in a law firm that has represented the school and Southern Missouri Waste Management for years. Southern Missouri Waste Management District is a party in this case. Counsel authored the brief in Southern Missouri Waste Management in whole or in part. Counsel is not counsel of record for Southern Missouri Waste Management. Charles Mix County is a rural area with more legal problems than lawyers. With this acknowledgement, counsel submits that this brief is in substantial compliance with Supreme Court Rule 37(6). No counsel or party made a monetary contribution intended to fund the preparation or submission of this *amicus curiae* brief for the School and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution.

2009), as amended by *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 985 (8th Cir. 2010). The Wagner School is located on part of this fee property. This fee property is within the city limits of Wagner. In its original (2009) decision, the Eighth Circuit Court of Appeals in dicta opined that after the enactment of 18 USC § 1151 in 1948, allotted land to which the Indian title has been extinguished still retained its status as Indian land. Prior to the enactment of § 1151, the settled law held that when allotted land passed to a non-Indian, the land was no longer considered Indian country. *See* 18 USC § 1151(c). However, in its 2009 decision, the court indicated that after the passage of § 1151 allotted lands sold to non-Indians still retained its Indian country status as a "reservation" under 18 USC § 1151(a).

ARGUMENT

1. The Wagner Community School District No. 11-4, hereinafter referred to as School, is a community school educating children from kindergarten through twelfth grade. The 225,000 square foot structure is situated on an 78.77 acre parcel of land located in the city limits on the western side of the City of Wagner, Charles Mix County, South Dakota. App. 1 *infra*, is an aerial view of the School's fee property, an isolated, non-contiguous tract of fee land that the panel placed within the limits of the Yankton Sioux Reservation. The school building contains numerous classrooms, laboratory rooms, a library,

auditorium with stage, shop rooms, two gymnasiums, a cafeteria, a swimming pool, administrative offices and utility rooms. It has a value in excess of fifteen million dollars and employs 155 people. Total student population is 777 with 391 of those being Indian and 386 being non-Indian. Also contained on the property is an outdoor football/track stadium along with two baseball fields and parking areas. The school also provides early learning services to children ages three and four, with approximate enrollment of 94 Indians and 40 non-Indians. The legal description of the property is Lot Four (4) and the Southwest Quarter of the Northwest Quarter (SW1/4NW1/4) less Lot H-1 in Lot 4, all in Section Four (4), Township Ninety-Five (95) North, Range Sixty-Three (63) West of the Fifth Principal Meridian, Charles Mix County, South Dakota, containing 78.77 acres, more or less. Lot H-1 of Lot 4 is occupied by the Wagner Fire Protection District, a political subdivision.

2. The panel decision conflicts with decisions of this Court and of the court of appeals and consideration by this Court is therefore necessary. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998) (YST), *DeCoteau v. District County Court*, 420 U.S. 425 (1975), *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977), *Rosebud Sioux Tribe v. Kneip*, 521 F.2d 87 (8th Cir. 1975), *Cook v. Parkinson*, 525 F.2d 120 (8th Cir. 1975), *Beardslee v. United States*, 387 F.2d 280 (8th Cir. 1967), *United States v. Stands*, 105 F.3d 1565 (8th Cir. 1997), *United States v. Provost*, 237 F.3d 934 (8th Cir. 2001) (former Yankton allotted

lands not reservation), and most recently *YST v. U.S. Army Corps of Engineers*, 606 F.3d 895 (8th Cir. 2010). The panel decision also conflicts with decisions of this Court and the court of appeals that have construed the General Allotment Act of 1887 (24 Stat. 388 (1887)).

3. This proceeding involves several questions of exceptional importance. The panel decision presents a question of exceptional importance because it squarely conflicts with a long line of *YST* decisions of the South Dakota Supreme Court (cited favorably by this Court in *YST* at 342, n.4), including *State v. Greger*, 559 N.W.2d 854 (S.D. 1997). *See also State ex rel. Hollow Horn Bear*, 95 N.W.2d 181 (1959) and *Bruguier v. Class*, 599 N.W.2d 364, 371 (S.D. 1999) ("congressionally terminated"). The panel decision conflicts with the authoritative decisions of other United States Court of Appeals that have addressed the issue. *Little Light v. Crist*, 649 F.2d 682 (9th Cir. 1981); *Ellis v. Page*, 351 F.2d 250 (10th Cir. 1965).

4. The panel again affirmed the district court. *Yankton Sioux Tribe v. Podhradsky*, 577 F.3d 951 (8th Cir. 2009). Incredibly, the panel, on its own notion, also incorrectly added over another 8,000 acres of noncontiguous *non-Indian fee land* to this unprecedented reservation because of a misreading of the generic Indian country statute, 18 USC § 1151, (that never mentioned the Yankton reservation and was passed in 1948, more than a half century after the Yankton Act).

In the process, no one was even given an opportunity to brief the 18 USC § 1151(a) reservation status of this fee land: not the State, not the County, not the United States, not the Tribe, and most importantly, not the landowners, with lives and property impacted ("within the limits" of a reservation), without *any* notice. This unprecedented holding was the direct result of the district court and the panel continuing to ignore the very strong presumption of diminishment/disestablishment. A subsequent Order on rehearing removed this language from the panel opinion. However, the practical consequences of the Order are unclear. *See* State Brief 4-5, 13-16, 34-35.

This Court should authoritatively resolve the post 1948 fee land issue. First, as the State has pointed out, the Order deleting the post 1948 fee land footnote is just a short term fix. The rationale for including post 1948 fee lands with 18 USC § 1151(a) reservation boundaries has not been completely withdrawn from the panel's opinion. As a result, the text of the panel opinion will undoubtedly be used in future litigation to argue that post 1948 fee lands are within the limits of an 18 USC § 1151(a) reservation. Secondly, post 1948 fee land expressly conflicts with the allotments in fee holding in *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir.), *cert. denied*, 530 U.S. 1261 (2000).

Another portion of the panel's opinion also merits attention. The panel recognizes reservation boundaries around all Indian allotments still held in trust. This holding also conflicts with allotment/fee holding

in *Gaffey*, and conflicts as well with the recent *Corps* case that expressly adopted this aspect of *Gaffey* as the holding in the *Corps* case. If the panel is correct that all allotments now held in trust are encompassed in 18 USC § 1151(a) reservation boundaries, then *Gaffey* could not have been correct in holding that allotments, now in fee, are not within 18 USC § 1151(a) reservation boundaries. In other words, 18 USC § 1151(a) boundaries do not automatically disappear just because a fee patent is issued. And 18 USC § 1151(a) reservation boundaries are not automatically resurrected because dicta in an opinion is taken out of context by the panel.

Congress has a role in this reservation boundary process that the court of appeals has not respected. Felix Cohen made clear that Congress did not address reservation boundaries after the passage of the Yankton Act (which disestablished the 1858 reservation boundaries). If any allotments were within an 18 USC § 1151(a) boundary at any time after the proclamation in the Yankton Act, *Gaffey* was wrongly decided. This conflict should be resolved. All of this confusion could have been avoided if the panel would have appropriately deferred to a century of precedent in the State of South Dakota. Clearly, South Dakota opinions are entitled to more respect than they received in any of the panel's decisions. Along these lines the panel should have accorded this Court's treatment of the South Dakota opinions more respect.

CONCLUSION

The decision of the court of appeals conflicts with the decision of the State Supreme Court in *Bruguier*. It also appears that there exists conflicting published opinions in the Eighth Circuit as to whether any allotted lands in Charles Mix County have reservation boundaries around them. It appears that *Podhradsky II* in part reverses *Gaffey II*.

Respectfully submitted,

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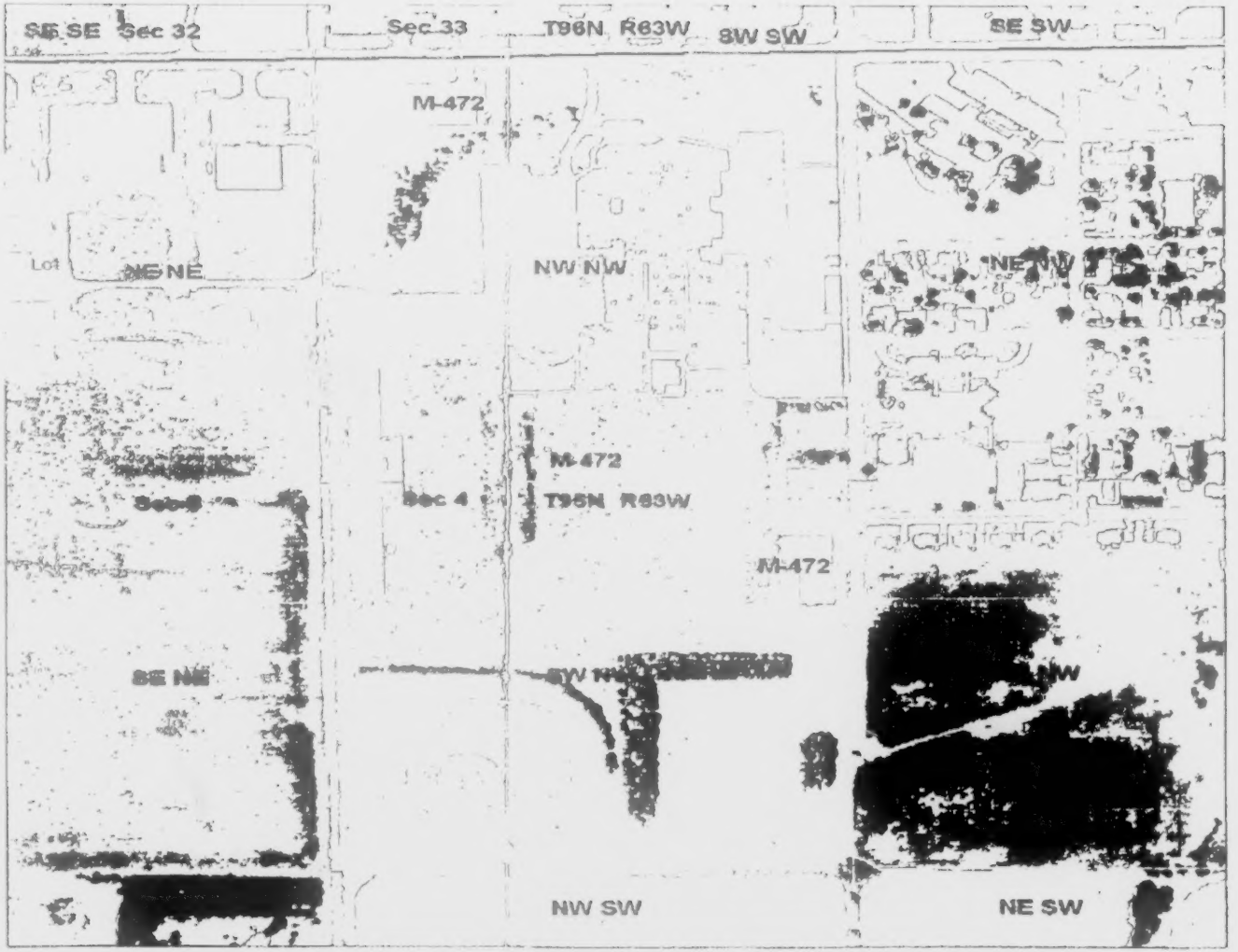
App. 1



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